LIANG JEE KENG

v.

YIK KEE RESTAURANT SDN BHD

HIGH COURT MALAYA, TEMERLOH
RAMLY ALI JC
[CIVIL SUIT NO: 22-45-1989]
25 JANUARY 2002

DAMAGES: *Action for - Employees' Social Security Act 1969, s. 31 - Whether bar to action - Whether employee an "insured person" under s. 2(11) of Act - Whether employee must be registered with the SOCSO office - Whether Act applicable so long as employer belonged to an industry to which Act applied*

LABOUR LAW: *Workmen's compensation - Claim for damages - Claim under common law - Whether barred by s. 31 Employees' Social Security Act 1969 - Whether employee an "insured person" under s. 2(11) of Act - Whether employee must be registered with the SOCSO office - Whether Act applicable so long as employer belonged to an industry to which Act applied*

In this case, the issue was whether the plaintiff employee was precluded from making his claim for damages against the defendant employer under the common law for injuries suffered by him during the course of his employment by virtue of s. 31 of the Employees' Social Security Act 1969 ('the SOCSO Act').

Held:

[1] In order to invoke s. 31 of the SOCSO Act, the court must first be satisfied that the plaintiff was at all material times, an "insured person" as defined under s. 2(11) of the SOCSO Act; and that the defendant was at all material times the employer of the plaintiff; and that the plaintiff as an employee, had sustained an employment injury in the course of his employment with the defendant. (p 753 f-g)

[2] By virtue of s. 2(11) of the SOCSO Act, even though an employee was not registered with the SOCSO office at the time of the accident and there were no contributions paid under the Act, the employee was still considered as an "insured person", if the contributions could be payable under the Act, so long as the industry was one to which the SOCSO Act applied. (p 754 d-e)

[3] It was not disputed that the defendant's restaurant business was an industry to which the SOCSO Act applied as defined under s. 2(10) of the Act and that the plaintiff was, at all material times, an employee of the defendant as defined under s. 2(5)(1) of the SOCSO Act. (p 754 f, g)

[4] Being an employee under the SOCSO Act who was employed in the industry to which the SOCSO Act applied, the plaintiff should and could be insured and contributions should and could have been payable under ss. 5 and 6 of the SOCSO Act. That being the case, the plaintiff was clearly an "insured person" at the time of the accident, even though he was only registered with the SOCSO office two days after the accident and no contributions were made to the SOCSO office at that time. Therefore, the plaintiff was caught by s. 31 of the SOCSO Act and therefore precluded from making any claim for compensation or damages against the defendant. The plaintiff's claim should have been under the SOCSO Act itself. (p 755 b, e)

[5] The court did not agree with the plaintiff's argument that the most crucial criteria in determining whether s. 31 of the SOCSO Act applied, was whether or not the employee was registered with the SOCSO office. That argument might hold water if the definition of an "insured person" was based on the previous provisions of s. 2(11) of the SOCSO Act, *ie*, before the 1987 amendment. But the present provisions which came into effect after 1 July 1987 make it clear that such a requirement is not necessary. This is clear from the words "notwithstanding that such industry or employee was not so registered" found in the present provisions but not in the previous provisions. (pp 755 h & 756 a)

[6] As the plaintiff was precluded from making this claim against the defendant by virtue of s. 31 of the SOCSO Act, the issues on the defendant's liability and quantum of damages would not be considered. (p 757 e)

[Plaintiff's claim dismissed.]

Case(s) referred to:

Abdul Ghani Hamid v. Abdul Nasir Abdul Jabbar & Anor [1995] 4 CLJ 317 ***(dist)***

Che Noh Yacob v. Seng Hin Rubber (M) Sdn Bhd [1982] 1 MLJ 80 ***(foll)***

Lian Ann Lorry Transport & Forwarding Sdn Bhd v. Govindasamy [1982] CLJ 538; [1982] 2 CLJ (Rep) 232 ***(refd)***

Sambu Pernas Construction & Anor v. Pitchakkaran [1982] CLJ 151; [1982] CLJ (Rep) 299 ***(refd)***

Legislation referred to:
Employees' Social Security Act 1969, ss. 2(a), (10), (11), 5(1), 6(1), 31, 42

For the plaintiff - Joseph Au; M/s Omar & Joseph Au
For the defendant - Karam Singh Bhal; M/s Ikmal Hisam Idris Bhal & Co

Reported by Usha Thiagarajah

JUDGMENT

Ramly Ali JC:

Background

The plaintiff was a minor of 14 years ten months when he was employed as a waiter at the defendant's restaurant at Karak Pahang. On 21 February 1988, at about 8.15pm, while working at the defendant's premises, the plaintiff was instructed to clean the meat mincing machine located at the kitchen within the same premises of the defendant's restaurant. While cleaning the said machine, the plaintiff's left arm was caught by the blades of the machine and crushed. As a result, an above elbow amputation was carried out at the General Hospital, Kuala Lumpur.

The plaintiff now claims damages under the common law, for the injuries suffered by him arose out of the negligence of the defendant. In his statement of claim, the plaintiff alleges that the defendant failed to provide the plaintiff with a safe system of work and that there were breaches of the Factories and Machinery Act 1967 and the Factories and Machinery (Fencing of Machinery & Safety) Regulations 1970.

It is not disputed that the plaintiff was not registered with SOCSO at the date of the accident, on 21 February 1988, but was only registered after the accident, that is on 23 February 1988. However, the defendant as an employer was registered with SOCSO sometime prior to the date of the accident.

The defendant, in disputing the plaintiff's claim, among other things, had raised an issue that the plaintiff, was precluded from making his claim against the defendant under the common law by virtue of s. 31 of the Employees' Social Security Act 1969 (SOCSO Act).

The Issues

The issues for the court to determine are as follows:

(1) Whether the plaintiff is precluded from making this claim by virtue of s. 31 of the SOCSO Act;

(2) If he is not so precluded, whether the defendant had failed to comply with both his common law as well as statutory obligations to ensure the safety of the plaintiff;

(3) If there is such a failure, what is the measure of damages payable to the plaintiff.

In respect of the first issue, if the plaintiff is precluded from making his claim against the defendant by virtue of s. 31 of the SOCSO Act, then he is not entitled to receive or recover from the defendant, any compensation or damages under any other law, including the common law, in respect of the employment injury sustained by him. If s. 31 of the SOCSO Act is applicable, then the plaintiff's claim against the defendant in the present proceedings can be dismissed without having to consider the second and third issues as stated above. The second and third issues will only be considered by the court if the court finds that the plaintiff is not precluded from making the present claim under s. 31 of the SOCSO Act. I shall now deal with the first issue.

Whether The Plaintiff Is Precluded From Making This Claim By Virtue Of Section 31 Of The SOCSO Act

Section 31 of the SOCSO Act reads as follows:

> An insured person or his dependant shall not be entitled to receive or recover from the employer of the insured person, or from any other person who is the servant of the employer, any compensation or damages under any other law for the time being in force in respect of an employment injury sustained as an employee under the Act.

In order to invoke s. 31, the court must first be satisfied that the plaintiff was at all material times, an 'insured person' as defined under s. 2(11) of the SOCSO Act; and that the defendant was at all material times, the employer of the plaintiff; and that the plaintiff as an employee, had sustained an employment injury in the course of his employment with the defendant. It has not been disputed all along the proceedings that the defendant was, at all material times, the employer of the plaintiff and that the plaintiff as an employee of the defendant had sustained employment injury in the course of his employment in an industry to which the SOCSO Act applies. Section 2(10) of the SOCSO Act defines "industry" as any business, trade, undertaking, manufacture or calling of employers, and includes any calling, service, employment, handicraft or industrial occupation or avocation of employees.

What needs to be determined by the court now is whether the plaintiff, at the time of the accident was an 'insured person' as defined under s. 2(11) of the SOCSO Act. The present s. 2(11) defines:

> "insured person" means a person who is or was an employee in respect of whom contributions are, were or could be payable under this Act, notwithstanding that such industry or employee was not so registered, so long as the industry was one to which this Act applies.

The present provisions of s. 31 were introduced into the SOCSO Act *vide* an amendment Act A675/87 which came into effect on 1 July 1987. Prior to that amendment, the previous provisions of s. 31 read:

> "insured person" means a person who is or was an employee in respect of whom contributions are or were payable under this Act and who is, by reason thereof, entitled to any benefits provided by this Act.

Comparing the present and the previous definitions, it is obvious that the present definitions of an "insured person" is much more wider than the previous one. It covers an employee in respect of whom contributions "could be payable" under the Act. It also covers an employee who was not so registered under the SOCSO Act, so long as the relevant industry was one to which the SOCSO Act applies. In other words, even though the said employee was not registered with the SOCSO office at the time of the accident and no contributions are or were paid under the Act, the employee is still considered as an "insured person" if the contributions "could be payable" under the Act, so long as the industry was one to which the SOCSO Act applies.

It is not disputed that the defendant's restaurant business is an industry to which the SOCSO Act applies, as defined under s. 2(10) of the Act. The previous provisions were much narrower and restrictive. A person who was not an "insured person" under the previous provisions may now be an "insured person" under the present provisions. Therefore, case law which dealt with the interpretation of an "insured person" under the previous provisions (ie, before 1 July 1987) may not be helpful to the interpretation of the present provisions.

In the present case, it is clear that the plaintiff was, at all material times, an employee of the defendant as defined under s. 2(5)(1) of the SOCSO Act, which provides:

> (5) "employee" means any person who is employed for wages under a contract of services or apprenticeship with an employer, whether the contract is expressed or implied or is oral or in writing, on or in connection with the work of an industry to which this Act applies and:
>
> (1) who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the industry, whether such work is done by the employee on the premises of the industry or elsewhere.

The plaintiff in the present case was employed as a waiter at the defendant's restaurant since ten months prior to the date of the accident, and was paid a salary of RM60 per month, by the defendant.

Being an employee under the SOCSO Act, who was employed in the industry to which the SOCSO Act applies, the plaintiff should and could be insured and contributions should and could have been payable under ss. 5 and 6 of the SOCSO Act. Section 5 of the SOCSO Act provides:

> Subject to the provisions of this Act, all employees industries to which this Act applies shall be insured in the manner provided by this Act.

Section 6(1) of the same Act provides:

> (1) The contribution payable under this Act in respect of an employee shall comprise contribution payable by the employer (herein after referred to as the employer's contribution) and contribution payable by the employee (herein after referred to as the employee's contribution) and shall be paid to the Organisation.

That being the case, the plaintiff was clearly an "insured person" at the time of the accident (ie, on 21 February 1988), even though he was only registered with the SOCSO office two days after the accident (ie, on 23 February 1988) and no contributions were made to the SOCSO office at that time. Therefore, the plaintiff is caught by s. 31 of the SOCSO Act and thus precluded from making any claim for compensation or damages against the defendant under any other law for the time being in force, including the common law, in respect of the employment injury sustained by him on 21 February 1988. The plaintiff's claim should have been under the SOCSO Act itself. In *Che Noh bin Yacob v. Seng Hin Rubber (M) Sdn. Bhd.* [1982] 1 MLJ 80, the Federal Court held that "once a person is an insured person under the Act, s. 31 and s. 42 of the Act constitute a complete bar to any claims against his employer under the common law." Even though the above case was decided before 1 July 1987, the ruling is still applicable because it does not relate to the actual definition of an "insured person", but relates to the effect on s. 31 (and s. 42) once a person is an "insured person".

The plaintiff's counsel argued that the most crucial criteria in determining whether s. 31 of the SOCSO Act applies was in the fact of whether or not the employee was registered with the SOCSO office. With respect, I do not agree with the counsel's argument on this point. That argument may hold water if the definition of an "insured person" is based on the previous provisions of s. 2(11) of the SOCSO Act (ie, before the 1987 amendment). But, the present provisions which came into effect after 1 July 1987 make it clear that

the requirement that the employee must first be registered with the SOCSO office is no more necessary. This is clear from the wordings "notwithstanding that such industry or employee was not so registered" as found under the present provisions. Those wordings were not to be found in the previous provisions.

The plaintiff's counsel has also cited a number of authorities to support his contention that the plaintiff was not an "insured person" at the time of the accident and therefore s. 31 is not applicable to bar the plaintiff from making the present claim under the common law against the defendant in respect of the said injury. The counsel cited two Federal Court decisions in *Sambu Pernas Construction & Anor v. Pitchakkaran* [1982] CLJ 151; [1982] CLJ (Rep) 299 and *Lian Ann Lorry Transport & Forwarding Sdn. Bhd. v. Govindasamy* [1982] CLJ 538; [1982] 2 CLJ (Rep) 232. Both the cases were decided in 1982, based on the previous provisions of the definition of an "insured person" before the amendment which came into effect on 1 July 1987. In *Sambu Pernas Construction*'s case *(supra)* the Federal Court held that the deceased employee was an "insured person" at the time of the accident and therefore her dependants was barred from suing the deceased employee's employer by virtue of s. 31 of the SOCSO Act. In *Lian Ann Lorry Transport & Forwarding Sdn. Bhd. (supra)*, again the Federal Court, in interpreting the previous provisions relating to the definition of an "insured person" ruled that although the respondent was an employee, he was not an "insured person" because he was not so registered at the time of the accident and no contributions in respect of him were payable under the SOCSO Act. The court finally held that the respondent could not be deprived by s. 31 of the SOCSO Act of the benefits under the common law and confirmed that s. 31 of the SOCSO Act has no application to the case.

As I have stated earlier in these grounds of judgment, that the provisions relating the definition of an "insured person" under s. 2(11) of the SOCSO Act have been amended *vide* Act A675/87 which came into effect on 1 July 1987. The scope of the present provisions are much wider and different compared to the previous one. Therefore the said interpretation in those cases cited by the plaintiff's counsel could not be used to help us in interpreting the present provisions.

The plaintiff's counsel also cited a more recent case of *Abdul Ghani bin Hamid v. Abdul Nasir bin Abdul Jabbar & Anor* [1995] 4 CLJ 317, where in that case, Abdul Malik Ishak J held that the plaintiff was not an "insured person" within the meaning of s. 31 of the SOCSO Act on the day of the accident and therefore was entitled as an aggrieved party to file the suit against the defendant under the common law.

I have the opportunity to comb through the full length of the grounds of judgment of that case and found that the plaintiff (in that case) was actually an employee of one Ridzuan Abdul Aziz. The said Ridzuan was a sub-contractor of Syarikat Rambena who contracted with the second defendant to provide service and repair to the sub-station where the accident occurred. As a sub-contractor, Ridzuan was thus doing the job for Syarikat Rambena. The said Ridzuan was also involved in the same accident and sustained severe burns and later died. That being the position, clearly the plaintiff was not an employee of the defendants as defined under s. 2(5) of the SOCSO Act. He was not even an employee to the "immediate employer" as defined under s. 2(a) of the SOCSO Act, as Ridzuan was not an "immediate employer". Therefore, although the case was decided after the amendment (1 July 1987), the plaintiff was held not to be an "insured person" because he was not even an "employee" of the defendants. That being the case, the plaintiff was not precluded from filing his suit against the defendants, who were not his employer, under the common law. Therefore, I am of the view that the ruling in that case cannot be applicable to the present case.

Conclusion

Based on the above considerations, it is my judgment that the plaintiff was an "insured person" under s. 2(11) of the SOCSO Act and therefore he is precluded from making this claim against the defendant by virtue of s. 31 of the same Act. That being the case, I am also of the opinion that the other issues regarding the defendant's liability and quantum of damages need not be considered. Therefore the plaintiff's claim is dismissed with costs.